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FILED
NOV 12 1996
CLERK

No. 95-2031

In the Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS YOUNG, ET AL., APPELLANTS

v.

KIRK FORDICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Mississippi is violating the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, by administering a registration system that reflects changes resulting from the manner in which it has chosen to implement the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, when those changes have not been precleared.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-9a) is unreported.

JURISDICTION

The three-judge district court entered its final judgment on February 9, 1996. J.S. App. 10a-11a. Appellants filed a notice of appeal on April 8, 1996. J.S. App. 12a-14a. On May 30, 1996, Justice Scalia extended the appellants' time to file a jurisdictional statement until June 17, 1996, and the jurisdictional statement was filed on that date. This Court noted probable jurisdiction on October 1, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, are reproduced as an appendix to this brief.

STATEMENT

This case involves the State of Mississippi's decision to implement the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.* (NVRA), by applying that statute's procedures to registration for federal elections but not to registration for state and local elections. For several years prior to January 1, 1995, the effective date of the NVRA, Mississippi had a "unitary" system of registration, under which all lawfully registered voters were entitled to vote in all elections—federal, state, and local. On February 10, 1995, however, Mississippi announced that it would henceforth implement a two-tiered or "dual" system of registration. Voters who register pursuant to the NVRA's procedures are entitled to vote only in federal elections and must register again if they wish to vote in state and local elections, while voters who register pursuant to the State's pre-existing procedures may vote in all elections.

Mississippi is a "covered jurisdiction" under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51, App. Section 5 provides that a covered jurisdiction may not enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless (1) the United States District Court for the District of Columbia issues "a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) the

proposed change "has been submitted * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c. The question presented in this case is whether Mississippi's federal-election-only implementation of the NVRA violates Section 5.

1. Mississippi has a long history of imposing discriminatory and burdensome registration requirements that have impeded minority citizens' exercise of the right to vote. See, *e.g.*, *United States* v. *Mississippi*, 380 U.S. 128, 131-133 (1965); *Jordan* v. *Winter*, 604 F. Supp. 807, 811-812 (N.D. Miss.) (three-judge court), summarily aff'd *sub nom. Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984). Because of its history of discriminatory voting practices, the State was one of the jurisdictions originally covered by the special provisions of the Voting Rights Act. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315-316, 329 (1966). As recently as 1987, a federal district court found that the State had violated Section 2 of the Voting Rights Act by maintaining a dual system that required voters to register for state elections in a separate procedure from the one in which they registered for local elections. See *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991) (*PUSH*).

2. The NVRA became effective in Mississippi on January 1, 1995. See 42 U.S.C. 1973gg note. The NVRA requires States to implement procedures designed to make registration less burdensome on voters and to remove opportunities for discrimination in the registration process. See generally 42 U.S.C. 1973gg (findings and purposes). The NVRA requires States to (1) treat every driver's license application as an application for voter registration, see 42 U.S.C. 1973gg-3; (2) accept applications for voter registration by mail, see 42 U.S.C.

1973gg-4; and (3) distribute voter registration applications with each application for services at various state agencies, including all public assistance and disability agencies as well as other agencies designated by the State, see 42 U.S.C. 1973gg-5. The NVRA also regulates the content of voter registration forms, see 42 U.S.C. 1973gg-3(c)(2)(B); 42 U.S.C. 1973gg-7(b)(1), and limits purges of voting rolls, see 42 U.S.C. 1973gg-6.[1]

The NVRA's requirements apply to elections for federal office. See, *e.g.*, 42 U.S.C. 1973gg-2(a) (Act requires States to "establish procedures to register to vote in elections for Federal office"). The statute allows each State to decide whether or not to apply the NVRA procedures to registration for state and local offices as well. See, *e.g.*, H.R. Rep. No. 9, 103d Cong., 1st Sess. 21 (1993) ("While this Act applies only to Federal elections and States are free to apply other regulations to State elections, many States will prefer to have the same requirements for both Federal and State elections."). Except for Mississippi, every State that has implemented the statute allows NVRA registrants to vote in all elections.[2]

3. Between the district court's 1987 decree in *PUSH* and the effective date of the NVRA, "Mississippi main-

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[1] The lower courts have upheld the NVRA against constitutional challenge. See, *e.g.*, *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996); *Association of Community Orgs. for Reform Now (ACORN)* v. *Edgar*, 56 F.3d 791 (7th Cir. 1995).

[2] Illinois's executive branch initially decided to implement the NVRA for federal elections only. That system was recently invalidated on state-law grounds, and the State has been enjoined to enroll all NVRA registrants for state and local, as well as federal, elections. See *Orr* v. *Edgar*, No. 1-96-1613, 1996 WL 549559 (Ill. App. Ct. Sept. 26, 1996). The time to appeal that decision to the Illinois Supreme Court has now expired.

tained a unitary system of voter registration: once a voter was registered properly for any election, he was registered effectively for all elections—local, state, and federal." J.S. App. 7a. State law provided that every citizen who met certain age and residency qualifications, who had not been convicted of specified crimes, "and who shall have been duly registered * * * by an officer of this state under the laws thereof * * * shall be a qualified elector in and for the county, municipality and voting precinct * * *, and shall be entitled * * * to vote at any election." Miss. Code Ann. § 23-15-11 (1990).[3]

On the NVRA's effective date, Mississippi's existing registration procedures were inconsistent with the federal statute in several respects. See U.S. Mot. for Summ. J. Attach. D6. Accordingly, the State was required to change its practices in order to conform them to the federal statute. See generally *ibid.* On December 5, 1994, the Attorney General of the United States formally asked the State to submit for preclearance any changes prompted by implementation of the NVRA. J.A. 105-106.

4. On December 20, 1994, the State submitted a package of NVRA-related voting changes to the Attorney

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[3] Despite that provision, voters who registered prior to 1984 were required to register for municipal elections through a procedure separate from the one in which they registered for state and federal elections. See *PUSH*, 674 F. Supp. at 1248-1249. In 1984, the state legislature prospectively eliminated that dual system to a large extent, but dual registration remained in many municipalities, and voters who had registered for state and federal elections under the old system were not automatically placed on the municipal voting rolls. See *id.* at 1249-1250. Following the *PUSH* court's decree, the State extended its 1984 changes to all municipalities and made those changes retroactive. See *Mississippi State Chapter, Operation PUSH* v. *Mabus*, 932 F.2d 400, 404 (5th Cir. 1991).

General for preclearance. See J.A. 109-110.[4] In its letter of submission, the State sought preclearance for an implementation manual (dated November 1994) prepared by the Secretary of State's office. *Ibid.* According to the State's letter, that manual constituted "Mississippi's plan to administratively implement NVRA." J.A. 109.[5] The State also transmitted an earlier implementation manual (dated July 1994), a publication describing NVRA registration procedures at state agencies, a set of new voter registration forms, information on training provided to state and local election officials, and a copy of draft legislation to conform state law to the NVRA. Attachs. D7-D13. A sentence in a table in a July 1994 compliance report included in the materials provided to the Attorney General stated that the proposed legislation would "[m]ake NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72.

Mississippi's submission letter and accompanying materials did not assert that the State intended to abandon its prior unitary registration system and utilize the NVRA procedures for federal elections only. Instead, both the State's "plan to administratively implement NVRA" and the other submitted materials implied that all voters enrolled pursuant to the federal statute would be registered for both state and federal elections. For example, the manual stated that Mississippi's prior mail-in registration form "ha[d] been redesigned" to conform with NVRA requirements. J.A. 30. The revised form, included in the submission, bore the title of "Mississippi Voter Registration Application." J.A. 50. It stated, "[i]f you are

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[4] We have lodged the State's submission with this Court.

[5] Section 5 applies to administrative as well as legislative changes in election law. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985).

not registered to vote where you now live, you can use this form to register to vote or report that your name or address has changed." *Ibid.* Similarly, the submission included a new form to be used in voter registration at driver's license offices; that form stated, "[u]nder the Motor-Voter Law, you may now make application to register to vote in Mississippi (or update your existing Mississippi Voter Registration) on the same form used for your Driver Services-related application." J.A. 62. The administrative manual also stated that the "NVRA requires election commissioners to follow specific procedures to purge voter registration lists," J.A. 34, and that certain "[c]urrent methods" of purging "will change" in light of the statute's requirements, J.A. 35.

From January 1, 1995, until February 10, 1995, many Mississippi election officials implemented the NVRA on a unitary basis and enrolled NVRA registrants for both state and federal elections. J.S. App. 3a-4a. Those officials did so in accordance with the instructions of Mississippi's Secretary of State, who had held training seminars for local election officials and state agency personnel in 1994. *Ibid.* At those seminars, the Secretary of State advised the officials "that citizens registering pursuant to the NVRA would be eligible for both federal and state elections." *Id.* at 3a.

On January 25, 1995, the proposed legislation to reconcile state law with the NVRA was tabled in the Mississippi legislature. J.S. App. 3a. The tabling of the proposed legislation created uncertainty regarding whether the State would continue to implement the NVRA on a unitary basis. Department of Justice officials were aware of that uncertainty but did not insist that the State make clear whether NVRA registrants would remain eligible to

vote in state and local elections.[6] The State did not withdraw its submission until the uncertainties were resolved, nor did it inform the Department that registration under the NVRA would be valid for federal elections only. The Department informed the State on February 1, 1995, that its submission had been precleared. *Id.* at 15a-19a. The preclearance letter did not identify the elections to which the NVRA procedures would apply.

5. On February 10, 1995, Mississippi's Secretary of State and its Attorney General jointly issued to state election officials a memorandum setting forth the status of NVRA registrants in Mississippi. J.S. App. 20a-23a. The memorandum stated that

> [v]oters who register under NVRA are presently not authorized to vote in state elections. Accordingly, circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must "flag" voters registered under NVRA on the voter registration books and pollbooks to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections.

Id. at 22a. The memorandum observed that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections. It is important, therefore, that they be informed that they presently are only authorized to vote in federal elections." *Id.* at 21a.[7] Voters who had registered

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[6] Department of Justice regulations governing the administration of Section 5 provide that the Attorney General may "request from the submitting authority any omitted information considered necessary for the evaluation of the submission." 28 C.F.R. 51.37.

[7] To implement that directive, the memorandum explained that

under NVRA procedures prior to February 10—and who had been placed on the rolls for all elections—were removed from the list of individuals eligible to vote in state and local elections. *Id.* at 4a.

6. On February 16, 1995, the Department of Justice formally requested that the State submit for preclearance its decision to treat NVRA registrants as ineligible to vote in state and local elections. J.S. App. 24a-25a. The Department's letter observed that "while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1." *Ibid.* When Mississippi refused to make such a submission, the United States brought an action to enforce the preclearance requirement. On April 20, 1995, the United States filed a complaint in the United States District Court for the Southern District of Mississippi. The complaint alleged that the State had violated Section 5 by adopting a dual system of voter registration without first obtaining pre-

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the Secretary of State's office is offering to notify by mail all voters registered under NVRA and present them the option of either visiting their circuit clerk's office and registering, or, completing a state mail-in voter registration form to be forwarded to their circuit clerk. The Secretary of State's office will bear the postage and printing cost for this effort. In order to complete this mailing, circuit clerks will be asked to provide to the Secretary of State a list of names and mailing addresses of all voters registered under NVRA. Clerks may, of course, elect to provide such notification themselves.

J.S. App. 22a.

clearance. Compl. ¶¶ 16-43.[8] On the same day, appellants brought a separate action, which alleged similar violations and sought similar relief. The two cases were consolidated (J.S. App. 5a), and a three-judge district court was convened to hear the Section 5 claim. See 42 U.S.C. 1973c.

7. On July 24, 1995, the district court issued an order granting the State's motion for summary judgment on the Section 5 claim and rejecting the plaintiffs' motions for summary judgment on that claim. J.S. App. 1a-9a. The court concluded that, under Mississippi law, only the legislature could decide to apply the NVRA's procedures to registration for state and local elections. *Id.* at 7a-8a. Because the State had never enacted proposed legislation to accomplish that end, the court believed that the Secretary of State's administrative authority to implement the NVRA extended to federal elections only. *Ibid.* In the district court's apparent view, the State's submission was limited to those aspects of implementation that the Secretary of State could accomplish administratively—those involving the implementation of the NVRA for federal elections—and those aspects "ha[d] been precleared" on February 1. *Ibid.*

Although many election officials had implemented the NVRA on a unitary basis from January 1 to February 10, the district court did not believe that the February 10 memorandum advising them to cease that practice constituted a voting change. It held that "the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance." J.S. App. 8a.

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[8] The complaint also alleged that Mississippi was violating Section 7(a)(2)(B) of the NVRA, 42 U.S.C. 1973gg-5(a)(2)(B), by failing to afford voter registration at "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities." See Compl. ¶¶ 44-50.

The district court found "no evidence of ratification," observing that "there is no evidence that the governor or the legislature or the Mississippi Attorney General condoned the month-long practice on the part of some election officials to qualify voters contrary to applicable state law." *Ibid.*

Finally, the court stated that "the fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance." J.S. App. 8a. Because the obligation to apply NVRA procedures to federal elections is imposed by federal law, the court asserted,

> it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance * * *.

Id. at 8a-9a.

The district court accordingly ruled for the State on the Section 5 claims. After a voluntary resolution of the NVRA claims, the court entered a final judgment pursuant to Fed. R. Civ. P. 58 on February 9, 1996. J.S. App. 10a-11a.

SUMMARY OF ARGUMENT

1. Mississippi's implementation of the NVRA clearly effected substantial changes in the State's voter registration procedures. Although the NVRA can be expected to have salutary consequences for minority participation in federal elections, the changes effected by Mississippi may

well have a deleterious effect on minority voting in state and local elections, particularly if NVRA registrants are not adequately informed of their federal-election-only status. Indeed, Mississippi officials have acknowledged the possibility of voter confusion and the consequent importance of devising and implementing procedures to apprise NVRA registrants of their ineligibility to vote in state and local elections. It is therefore essential that the Attorney General or the District Court for the District of Columbia be given an opportunity, through the preclearance process, to ensure that the State's method of NVRA implementation does not have the purpose or effect of denying or abridging the right to vote on account of race or color.

2. Mississippi's current system for implementing the NVRA has not been precleared. Under well-established principles of Section 5 jurisprudence, all changes for which a covered jurisdiction seeks preclearance must be clearly and unambiguously identified in the submission made to the Attorney General. At the time of preclearance on February 1, 1995, neither the preclearance submission itself nor the actions of state officials made clear that Mississippi intended to limit its NVRA implementation to federal elections only. The Department's preclearance letter therefore cannot reasonably be construed as approving the State's current dual registration system. The Department's subsequent letter of February 16, 1995, further refutes any inference that the Department intended to preclear a dual system.

3. The district court appeared to recognize that the State's implementation of a dual registration system had not been submitted for preclearance. The court held, however, that the preclearance requirement was inapplicable. That holding is incorrect.

a. The fact that Mississippi's new registration procedures were implemented in response to a federal mandate does not render the preclearance requirement inapplicable. Although the NVRA did not require Mississippi to apply the Act's procedures in state and local elections, nothing in federal law prohibited the State from doing so. Mississippi's decision to limit the NVRA procedures to federal elections was a discretionary state policy choice, not the product of federal compulsion. Various subsidiary decisions—including decisions regarding the methods by which NVRA registrants would be informed of their federal-election-only status—were also discretionary. This Court's precedents make clear that covered jurisdictions must obtain preclearance before implementing changes adopted in an attempt to comply with federal law, and the NVRA itself confirms that rule. Mississippi's decision to implement the NVRA for federal elections only therefore is not exempt from preclearance as a nondiscretionary act required by federal law.

b. The district court also stated that the State "may correct a misapplication of its laws" without obtaining preclearance for the resulting change. J.S. App. 8a. This Court's precedents make clear, however, that Section 5 requires preclearance for any change from the practice that is *in fact* "in force or effect," even if the existing practice is inconsistent with state law. Here, the Mississippi Secretary of State instructed local registrars to treat NVRA registrants as eligible to vote in all elections, and many registrars followed that directive. The Secretary of State's instruction remained in effect for over a month, and thousands of voters were registered under NVRA procedures. Whatever the propriety of the Secretary of State's actions as a matter of state law, under the procedures actually "in force or effect" in Mississippi during January and early February of 1995, NVRA regis-

trants were eligible to vote in all elections. The State's subsequent decision to exclude those voters from state and local elections effected a change subject to Section 5's preclearance requirement.

Even if no unitary system of NVRA registration was ever "in force or effect" in Mississippi, it would not follow that the State may continue to implement its current dual system without obtaining preclearance. Mississippi's current practices and procedures for voter registration differ substantially from those in effect before January 1, 1995. Although the Department did issue a preclearance letter on February 1, 1995, its preclearance decision reflected the premise that Mississippi had sought preclearance for a practice of permitting NVRA registrants to vote in all elections. Because Mississippi's federal-election-only system was never submitted for preclearance (and indeed was adopted after the February 1 preclearance letter), that letter did not authorize the current system, which must be submitted for preclearance.

ARGUMENT

THE DISTRICT COURT WAS REQUIRED TO ENJOIN MISSISSIPPI'S FEDERAL-ELECTION-ONLY IMPLEMENTATION OF THE NVRA

Mississippi is a "covered jurisdiction" under Section 5 of the Voting Rights Act. See 28 C.F.R. Pt. 51, App. A covered jurisdiction may not enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance for the change. 42 U.S.C. 1973c; *Lopez* v. *Monterey County*, No. 95-1201 (Nov. 6, 1996), slip op. 10; *Clark* v. *Roemer*, 500 U.S. 646, 652 (1991). A proposed voting change may be precleared either by the United States District Court for the District of Columbia (through the issuance of a declaratory judgment that the

change has no discriminatory purpose or effect) or by the Attorney General (if she fails to "interpose[] an objection" within the 60-day period after the proposed change is submitted to her). 42 U.S.C. 1973c.[9] In an action to enforce the preclearance requirement, a local three-judge district court may not consider whether the change is discriminatory in purpose or effect. By the terms of Section 5, that substantive question is reserved for the Attorney General or the District Court for the District of Columbia. The enforcement court may consider only whether the change is subject to Section 5 and whether it has been precleared. See, *e.g.*, *Lopez*, slip op. 14 ("On a complaint alleging failure to preclear election changes under § 5, [the three-judge] court lacks authority to consider the discriminatory purpose or nature of the changes."); *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins* v. *Matthews*, 400 U.S. 379, 383-386 (1971). If the change is

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[9] Thus, preclearance by the Attorney General differs from preclearance through a declaratory judgment action

> in that implementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect. To the contrary, compliance with § 5 is measured solely by the *absence*, for whatever reason, of a timely objection on the part of the Attorney General.

Morris v. *Gressette*, 432 U.S. 491, 502 (1977) (footnote omitted); see 28 C.F.R. 51.42 ("the failure of the Attorney General to make a written response within the 60-day period constitutes preclearance of the submitted change"). In order to facilitate expeditious implementation of proposed changes, however, the Attorney General may (and typically does) affirmatively indicate, before the expiration of the 60-day period, that no objection will be made. 42 U.S.C. 1973c; 28 C.F.R. 51.41.

subject to preclearance but has not been precleared, the United States or private plaintiffs "are entitled to an injunction prohibiting implementation of the change." *Lopez*, slip op. 10; accord *Clark*, 500 U.S. at 652-653.

Applying those principles, the district court was required to enjoin Mississippi's dual system of voter registration. The State's implementation of the NVRA has effected a variety of changes in its prior registration practices and procedures. Because significant aspects of Mississippi's current system of NVRA implementation have not been precleared, the district court was required to enjoin those changes.

A. Mississippi's NVRA Implementation Required Changing The State's Existing Voter Registration Procedures

Mississippi's implementation of the NVRA clearly effected substantial changes in the State's voter registration procedures. See U.S. Mot. for Summ. J. Attach. D6; J.S. App. 3a (noting that the State's "submission included a manual drafted by the Secretary of State listing basic changes necessary to bring Mississippi's voter registration procedures in compliance with the NVRA"). Although the NVRA can be expected to have salutary consequences for minority participation in federal elections, the changes effected by Mississippi may well have a deleterious effect on minority voting in state and local elections. Because "it is well settled that every voting change with a 'potential for discrimination' must be precleared," *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 505 (1992); accord, *e.g.*, *Hampton County Election Comm'n*, 470 U.S. at 181, Mississippi was required to submit its NVRA implementation plan to the Attorney General or the District Court for the District of Columbia.

Under the State's federal-election-only NVRA system, NVRA registrants must be placed on separate voter lists, which will likely increase voter confusion at the polls. In addition, voters who register under the NVRA procedures may fail to register for state and local elections in the mistaken belief that NVRA registration is effective for all elections. To the extent that minority voters comprise a disproportionate percentage of NVRA registrants in Mississippi, the State's method of implementing the NVRA may "have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. Black voters in Mississippi may thus be worse off under a dual registration system than they were before the enactment of the NVRA.[10]

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[10] Indeed, Mississippi's adoption of a dual registration system raises particular Voting Rights Act concerns. Mississippi legislation expressly provides that every individual who registered to vote in any type of election is enrolled for all types of elections. See Miss. Code Ann. § 23-15-11 (1990). As recently as 1987, a federal court had invalidated an earlier dual system—in which persons were required to register for municipal elections in a procedure separate from the one in which they registered for state and federal elections—because it concluded that "Mississippi's original dual registration requirement was enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890." *PUSH*, 674 F. Supp. at 1251. The court further found that the dual system continued to "have a discriminatory result and deny black voters equal access to the political process." *Id.* at 1252. The court concluded that "[m]ore black citizens than white have been denied the right to vote in municipal elections, because their names could not be found on municipal registration rolls, and this has probably resulted in the defeat of black candidates." *Id.* at 1255. It explained that, due to socioeconomic disparities between white and African-American Mississippi residents, the latter were disproportionately affected by the additional barrier to registration inherent in requiring voters to register separately for different types of elections. See *id.* at 1255-1256.

At the time they announced that NVRA registrants would be eligible for federal elections only, Mississippi's Attorney General and Secretary of State acknowledged that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections." J.S. App. 21a. Those officials recognized the importance of devising and implementing procedures to ensure that NVRA registrants were aware of their ineligibility to vote in state and local elections. *Id.* at 21a-22a. Yet they have never submitted such procedures for Section 5 review. Whether the State's implementation of the NVRA will "have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c, may depend upon the adequacy of those procedures. It is therefore essential that the Attorney General or the District Court for the District of Columbia be given an opportunity, through the preclearance process, to assess the sufficiency of those safeguards.[11] As we demonstrate in Part B, *infra*, neither the

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More recent data demonstrates that those socioeconomic disparities continue. According to the 1990 Census, 46.4% of African-Americans in the State have incomes below the poverty level; the poverty rate for whites in the State is 13.2%. See U.S. Dep't of Commerce, Economics & Statistics Admin., Bureau of the Census, *1990 Census of Population: Social & Economic Characteristics: Mississippi* 83 (1993).

[11] Notification and re-registration procedures may be implemented in a discriminatory manner, and notice from the State may be the only way for NVRA registrants to discover that they are registered only for federal elections. The quality, accuracy, and reliability of that notice may well determine whether NVRA voters forego re-registering for state elections out of a mistaken belief that they are already effectively registered for all elections. The availability and accessibility of re-registration opportunities will bear heavily on this question as well. In light of the socioeconomic disparities found in *PUSH* and confirmed by the 1990 Census, see note 10, *supra*, ineffective notification and re-registration procedures may have an adverse impact on African-

Attorney General nor the District Court for the District of Columbia has been given that opportunity.

B. Mississippi's Current System For Implementing The NVRA Has Not Been Precleared

When a covered jurisdiction makes a preclearance submission, it "must identify with specificity each change that it wishes the Attorney General to consider." *Clark*, 500 U.S. at 658. "[A]ny ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Id.* at 656. Where a jurisdiction calls the Attorney General's attention to only some of the respects in which a new electoral scheme alters existing practice, "the Attorney General's failure to object to the submission [does] not constitute preclearance of elements in the scheme that were not submitted." *McCain* v. *Lybrand*, 465 U.S. 236, 256 n.28 (1984); see also *Hampton County Election Comm'n*, 470 U.S. at 181-182; *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 571 (1969).

The reason for this stringent rule is clear. In calendar year 1995, the Attorney General received approximately 4,000 Section 5 submissions involving over 14,000 proposed voting changes. As this Court observed in *Clark*, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." 500 U.S. at 658. The Attorney General is required to make a variety of complex factual determinations during the 60-day preclearance period and is not able, as a practical matter, also to "monitor and identify each voting change in each jurisdiction subject to § 5." *Ibid.* If States were not required to advise the Attorney General specifically of each change worked by a

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American Mississippians. The adequacy of these procedures is therefore central to determining the validity of Mississippi's federal-election-only implementation of the NVRA.

submission, "it would add to the Attorney General's already redoubtable obligations," "diminish covered jurisdictions' responsibilities for self-monitoring," and create an incentive for States to make their submissions as broad and ambiguous as possible. *Id.* at 658-659; accord *McCain*, 465 U.S. at 257.

With one exception,[12] the materials the State submitted to the Attorney General in December 1994 gave no indication whatsoever that voters enrolled pursuant to the NVRA might be registered only for federal elections and that election officials would now maintain separate voting lists for state and local elections. See pp. 6-7, *supra*. Indeed, the Secretary of State (the chief state election

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[12] Mississippi's submission did include the proposed state legislation to apply NVRA procedures to state and local elections. A single sentence in a table in a July 1994 compliance report included in the materials provided to the Attorney General stated that the proposed state legislation would "[m]ake NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72. That aspect of the submission might plausibly be read to suggest that without the proposed legislation, the applicability of NVRA procedures to state and local elections would be open to question. Mississippi's submission did not state, however, that the failure to enact that legislation would limit the application of NVRA procedures to federal elections only. No state official informed the Department, during the week between the tabling of the legislation on January 25, 1995, and the preclearance decision on February 1, that the failure of the legislation would have that effect. Nor did Mississippi's submission identify any mechanism for implementing the NVRA on a federal-election-only basis in the event that the proposed legislation failed to pass. The Attorney General was aware, moreover, that the executive in another State (Texas) had resolved a similar dilemma by implementing the NVRA administratively for all elections in the absence of conforming state legislation. See U.S. Mot. for Summ. J. Attachs. R and S. See generally *City of Lockhart*, 460 U.S. at 133 n.8 ("We doubt that Congress intended to force either [the Attorney General or the District Court for the District of Columbia] into speculation as to state law.").

official designated to coordinate implementation of the NVRA, see 42 U.S.C. 1973gg-8) had instructed subordinate officials to implement NVRA registration on a unitary basis—by applying the federal statute's procedures to all elections—and many of those officials followed that instruction. See p. 7, *supra*. Regardless of whether, in retrospect, the actions of Mississippi officials were appropriate as a matter of state law, those actions refute any suggestion that Mississippi had made clear its intention to treat NVRA registrants as ineligible for state and local elections. At the time of preclearance on February 1, neither the preclearance submission itself nor the actions of state officials made clear that Mississippi intended to limit its NVRA implementation to federal elections only. The State therefore failed to submit its current dual registration system for preclearance, and the Department's February 1 letter cannot reasonably be construed as approving that system. See *Clark*, 500 U.S. at 658 (covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider"); *Hampton County Election Comm'n*, 470 U.S. at 182 (preclearance of one state enactment could not be construed to validate other changes "that had not even been decided upon by state authorities at the time the Attorney General approved" the State's submission).

On February 10, 1995, state officials announced for the first time that NVRA registrants in Mississippi would not be eligible to vote in state and local elections. Six days later, the Department of Justice informed the State that, in the Department's view, the submission precleared on February 1 "did not seek preclearance for a dual registration and purge system." J.S. App. 25a. The February 16 letter serves as closely contemporaneous evidence of the Department's intent in preclearing the State's submission. Cf. *McCain*, 465 U.S. at 255-256 (noting that

"after-the-fact Justice Department statements have been previously relied upon in determining whether a particular change was actually precleared"). That letter further refutes any suggestion that Mississippi's dual registration system has been precleared by the Attorney General.

C. Mississippi's Decision To Implement The NVRA For Federal Elections Only Is Not Exempt From Preclearance, Either As A Nondiscretionary Act Required By Federal Law Or As A Correction Of A Prior "Misapplication" Of State Law

In refusing to enjoin the State's dual system of voter registration, the district court appeared to recognize that the current system had not been precleared. The court determined, however, that the State's decision to adopt that dual system was exempt from the preclearance requirement. The court based that conclusion on its belief that the State's decision was (1) a nondiscretionary act required by federal law, and/or (2) a permissible correction of a prior "misapplication" of state law. Neither of those theories provides a satisfactory basis for the court's refusal to enforce the preclearance requirement.

1. The district court asserted that "it is the federal government that has created this system of dual registration, not the State of Mississippi." J.S. App. 8a. In the court's view, that conclusion followed from the fact that "[t]he NVRA records are maintained at the instance of the federal government and pursuant to federal law." *Ibid.* The court concluded that "[t]he State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General." *Id.* at 8a-9a.

That analysis contradicts this Court's precedents. "[W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable." *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981). The NVRA requires States to use certain procedures in registering voters for federal elections. But nothing in federal law forbids a State to apply the Act's procedures in state and local elections as well. Mississippi's decision to limit the NVRA procedures to federal elections was a discretionary state policy choice, not the product of federal compulsion. Indeed, Mississippi stands alone among all 50 States (and other U.S. jurisdictions) in having adopted such a policy. Mississippi's decisions to adopt the particular notification, list maintenance, and purging procedures that it is using to implement the dual system were also discretionary.

This Court has long held that covered jurisdictions must obtain preclearance before implementing changes adopted in an attempt to comply with federal law. See *Allen*, 393 U.S. at 565 n.29 ("A State is not exempted from * * * § 5 merely because its legislation is passed in an attempt to comply with the [Voting Rights] Act."); *McDaniel*, 452 U.S. at 149-150 (covered jurisdiction must obtain preclearance for a change in its voting practices even where "a change is required to remedy a constitutional violation"). When it enacted the NVRA, Congress reaffirmed that rule. The statute expressly provides that it does not "supersede, restrict, or limit the application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1). And "[n]othing" in the NVRA "authorizes or requires conduct that is prohibited by" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(2). Congress in fact rejected a proposed amendment that would have exempted NVRA implementa-

tion from Section 5's preclearance requirement. See H.R. Rep. No. 9, *supra*, at 37 (minority report). Where a State decides to implement the NVRA by changing its practice of enrolling all registrants for all elections, that decision, and the procedures the State employs to implement that change, must be submitted for preclearance.

2. As noted above, the Mississippi Secretary of State initially instructed subordinate officials to implement NVRA registration on a unitary basis, and many of those officials followed that instruction. The district court nevertheless held that the February 10 letter directing officials to cease that practice "did not effect a change subject to § 5 preclearance." J.S. App. 8a. The court explained that, in its view, "the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General." *Ibid.* For two reasons, the court's analysis provides no justification for its decision not to enjoin the State's current dual system.

a. As this Court's decisions make clear, a covered jurisdiction must obtain preclearance for a change from "the procedure *in fact* 'in force or effect,'" *Perkins*, 400 U.S. at 395, even where that procedure violates state law. In *Perkins*, the Court held that the City of Canton, Mississippi, was required to obtain preclearance before holding at-large aldermanic elections in 1969. The use of an at-large system constituted a change because the previous election, in 1965, had been held in single-member districts. *Perkins*, 400 U.S. at 394-395. The Court held that preclearance was necessary even though the use of single-member districts in 1965 had violated a pre-existing state statute requiring at-large elections. *Id.* at 394. It concluded that "the procedure *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within § 5."

Id. at 395. The Court reaffirmed in *City of Lockhart* that the propriety under state law of a jurisdiction's existing practice is "essentially irrelevant" to the Section 5 inquiry, 460 U.S. at 132, because "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect," *id.* at 133. The Court further explained: "We also believe that the Attorney General and the District Court for the District of Columbia should be free to decide preclearance questions on the essentially factual issues of discriminatory purpose and effect. We doubt that Congress intended to force either into speculation as to state law." *Id.* at 133 n.8.

The Mississippi Secretary of State's directive to treat NVRA registrants as eligible for all elections was in place for over a month and resulted in the registration for state and local elections of "[a] few thousand" voters. J.S. App. 7a. Even if the Secretary of State's instructions were considered to have been conveyed in a relatively informal manner, this Court has made clear that even informal instructions may have Section 5 consequences. See *Hampton County Election Comm'n*, 470 U.S. at 178; *Allen*, 393 U.S. at 552, 570. And while the governor and legislature did not expressly and affirmatively ratify the Secretary of State's instructions, the Secretary of State is a constitutional officer of the State of Mississippi with substantial responsibility for elections; the governor had designated the Secretary of State as the Chief State Election Official for the purpose of implementing the NVRA; and both the governor and legislature were represented on the gubernatorially-created committee in which those instructions were developed. See U.S. Mot. for Summ. J. Attach. B. Nonetheless, until February 10, the governor and the legislature took no action to rescind, disapprove, or call into question the Secretary of State's

directive. The Secretary of State's instructions to local registrars, and their implementation of those instructions, therefore established a "standard, practice, or procedure" that was "in force or effect" within the State of Mississippi, 42 U.S.C. 1973c, and that could be changed only through preclearance under Section 5.[13]

b. Even if no unitary system of NVRA registration was ever "in force or effect" in Mississippi, it would not follow that the State may continue to implement its current dual system without obtaining preclearance. It is beyond dispute that Mississippi's current practices and procedures for voter registration differ substantially from those in effect prior to January 1, 1995. It is also clear that Mississippi's current system of NVRA implementation has not been approved by the Attorney General. Although the Department did issue a preclearance letter on February 1, 1995, its preclearance decision (as the February 16 letter made clear) reflected the premise that Mississippi had adopted a practice of permitting NVRA registrants to vote in all elections.[14] Even if it were

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[13] Not every isolated action by an official of a covered jurisdiction establishes a "standard, practice, or procedure" that is "in force or effect" (42 U.S.C. 1973c) within that jurisdiction. Cf. *United States* v. *Saint Landry Parish School Bd.*, 601 F.2d 859, 861-865 (5th Cir. 1979) (participation by three poll commissioners in illegal vote-buying scheme did not effect a change in the State's electoral practices subject to Section 5's preclearance requirement). The factors explained in text, however, fully justify the conclusion that the policy at issue here could be changed only through preclearance by the Attorney General or the District Court for the District of Columbia.

[14] The January 25, 1995, tabling of the proposed state legislation to reconcile state law with the NVRA created uncertainty as to whether Mississippi would continue to follow its then-existing practice of treating NVRA registrants as eligible to vote in all elections. Department of Justice officials were aware of that uncertainty and might have requested clarification as to the State's intentions before precleering

determined that no such practice was ever "in force or effect" within the meaning of Section 5, the significant changes effected after January 1, 1995, would remain subject to Section 5 scrutiny because the Department was not asked to, and did not, preclear a dual registration system. For that system to be validated as required by the Voting Rights Act, the Department or the District Court for the District of Columbia must be allowed to determine whether the State's program of NVRA implementation, taken as a whole, has the purpose or effect of "denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c.

The district court appears to have concluded (see J.S. App. 8a) that the Department had precleared the procedures developed by the State to register NVRA voters for federal elections,[15] and that the validity of that pre-

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the submission that had previously been submitted. See 28 C.F.R. 51.37 (Attorney General may "request from the submitting authority any omitted information considered necessary for the evaluation of the submission"); *Georgia* v. *United States*, 411 U.S. 526, 539-541 (1973). With the benefit of hindsight, we acknowledge that such a request might have been preferable. At the time the Department issued its preclearance letter, however, there were significant reasons to favor expeditious action on Mississippi's submission. The NVRA required the State to implement the registration procedures specified therein beginning on January 1, 1995. The Voting Rights Act, however, prohibited the State from administering unprecleared changes in its voting procedures. Prompt preclearance of Mississippi's submission appeared at the time to minimize the tension between the conflicting legal mandates to which the State was subject. Of course, it was the State's responsibility in the first instance to comply in a timely manner with both the Voting Rights Act and the NVRA.

[15] Although the court's opinion is not entirely clear on this point, the court appears to have accepted Mississippi's contention that "the Attorney General precleared only those changes necessary to allow Mississippi to administratively implement the NVRA for federal elections, such as Mississippi's choices regarding the agencies desig-

clearance was unaffected by the State's subsequent decision to exclude NVRA registrants from eligibility to vote in state and local elections. The court's apparent reasoning was that (1) the State submitted, and the Attorney General precleared, an array of procedures for implementing the NVRA with respect to federal elections; and (2) the State considered, but ultimately declined to adopt, a similar set of changes in the procedures governing state and local elections.

That theory incorrectly presumes, however, that the State's NVRA registration procedures for federal elections can be properly evaluated in isolation—*i.e.*, without knowing whether NVRA registrants will be permitted to vote in state and local elections. As we explain above (see pp. 16-18, *supra*), the availability of expedited registration procedures for federal elections may have deleterious consequences for minority participation in state and local elections, particularly if NVRA registrants incorrectly conclude that they are eligible to vote in all elections. For example, registration forms (like those Mississippi submitted for preclearance) that do not clarify that their use is limited to federal elections may be entirely proper for use in a unitary NVRA system, but misleading, with discriminatory effect, if used in a dual system. Whether the State's current implementation of the NVRA will "have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c, may depend on the adequacy of the procedures used to inform NVRA registrants of their limited status. Cf. *City of Lockhart*, 460 U.S. at 131 (noting that "[t]he possible discriminatory purpose or effect of" changes subject to Section 5's pre-

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nated for federal registration and the methods used to purge federal voter registration lists." J.S. App. 3a.

clearance requirement "cannot be determined in isolation from the 'pre-existing' elements of" the electoral scheme).

Thus, even if the district court were correct that no unitary system of NVRA registration was ever "in force or effect" in Mississippi, the court erred in concluding that the Department's February 1 preclearance letter sufficed to authorize the continued implementation of the State's current scheme.[16] The State's announced decision to limit NVRA registrants to federal elections only, and its development of procedures designed to apprise those registrants of their limited status and of opportunities to register for state and local elections, occurred well after the Department issued that letter. Because the State's current method of NVRA implementation has not been precleared, the district court was required to enjoin its implementation.

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[16] Since Section 5 preclearance is required whether or not a unitary system of NVRA registration was in fact ever "in force or effect," this Court need not resolve that issue. However, when Mississippi's system of NVRA implementation is ultimately submitted for preclearance, the determination whether such a practice was formerly "in force or effect" may affect the "benchmark" (28 C.F.R. 51.54(b)(1)) against which the current federal-election-only regime should be assessed. If the State is found to have adopted, and the Department to have precleared, a practice of permitting NVRA registrants to vote in all elections, that practice would constitute the relevant benchmark. If it is determined that no unitary system of NVRA registration was ever "in force or effect" in Mississippi, the State's pre-1995 unitary system of voter registration (as modified by those precleared changes that *were* implemented after January 1, 1995) would furnish the relevant benchmark. See 28 C.F.R. 51.54(b)(1); *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for the entry of appropriate relief.

Respectfully submitted.

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NOVEMBER 1996

APPENDIX

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides:

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or

subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day

period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

2. The National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, provides:

§ 1973gg. Findings and purposes

(a) Findings

The Congress finds that-

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are-

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

§ 1973gg-1. Definitions

As used in this subchapter-

(1) the term "election" has the meaning stated in section 431(1) of title 2;

(2) the term "Federal office" has the meaning stated in section 431(3) of title 2;

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(4) the term "State" means a State of the United States and the District of Columbia; and

(5) the term "voter registration agency" means an office designated under section 1973gg-5(a)(1) of this title to perform voter registration activities.

§ 1973gg-2. National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office-

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person-

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

(b) Nonapplicability to certain States

This subchapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after March 11, 1993, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after March 11, 1993, or that was enacted on or prior to March 11, 1993, and by its terms is to come into effect upon the enactment of this subchapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

§ 1973gg-3. Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) Limitation on use of information

No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) Forms and procedures

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license-

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to-

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that-

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application-

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) Change of address

Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) Transmittal deadline

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

§ 1973gg-4. Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to Section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if-

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person-

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 1973gg-6(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg-6(d) of this title.

§ 1973gg-5. Voter registration agencies

(a) Designation

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies-

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3)(A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include-

(i) State or local government offices such as public libraries, public schools, offices of city and country clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in para-

graph (2)(B) that provide services to persons with disabilities; and

(ii) Federal and nongovernmental offices, with the agreement of such offices.

(4)(A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not-

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to

lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall-

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance-

(i) the mail voter registration application form described in section 1973gg-7(a)(2) of this title, including a statement that-

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 1973gg-7(a)(2) of this title, unless the applicant, in writing, declines to register to vote;

(B)provide a form that includes-

(i)the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the

amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(v) the statement, "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with_____.", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the

office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) Federal Government and private sector cooperation

All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a) of this section, and all nongovernmental entities are encouraged to do so.

(c) Armed Forces recruitment offices

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) of this section for all purposes of this subchapter.

(d) Transmittal deadline

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

§ 1973gg-6. Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall-

(1) ensure that any eligible applicant is registered to vote in an election-

(A) in the case of registration with a motor vehicle application under section 1973gg-3 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except-

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reasons of-

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section;

(5) inform applicants under sections 1973gg-3, 1973gg-4, and 1973gg-5 of this title of-

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office-

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) of this section by establishing a program under which-

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that-

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends

the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) of this section to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude-

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a) of this section; or

(ii) correction of registration records pursuant to this subchapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant-

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B) of this section. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the regis-

trant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant-

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the

registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d) of this section.

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 1973gg-8 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include-

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as

the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for a least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means-

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

§ 1973gg-7. Federal coordination and regulations

(a) In general

The Federal Election Commission-

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for im-

provements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2) of this section-

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that-

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application-

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

§ 1973gg-8. Designation of chief State election official

Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this subchapter.

§ 1973gg-9. Civil enforcement and private right of action

(a) Attorney General

The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this subchapter.

(b) Private right of action

(1) A person who is aggrieved by a violation of this subchapter may provide written notice of the violation to the chief election official of the State involved.

(2) If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election

for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

(3) If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved person need not provide notice to the chief election official of the State under paragraph (1) before bringing a civil action under paragraph (2).

(c) Attorney's fees

In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

(d) Relation to other laws

(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

(2) Nothing in this subchapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

§ 1973gg-10. Criminal penalties

A person, including an election official, who in any election for Federal office-

(1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for-

(A) registering to vote, or voting, or attempting to register or vote;

(B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote; or

(C) exercising any right under this subchapter; or

(2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by-

(A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

(B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held,

shall be fined in accordance with title 18 (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31), notwithstanding any other law), or imprisoned not more than 5 years, or both.